RAMACHANDRAM APPALANAIDU & ORS v. GASING MERIDIAN SDN BHD

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
ZAKARIA SAM JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: W-02(IM)-1356-06-2013]
12 FEBRUARY 2018

CIVIL PROCEDURE: *Judgments and orders – Ex parte stay order – Discharge of – Appeal against – Whether ex parte stay order an injunction – Whether order directed to restrain performance of act or conduct by other party to proceeding – Whether order could be directed to suspending operation of an authority's decision _ Whether court ought to look at substance rather than form – Rules of the High Court 1980, O. 32 r. 6*

CIVIL PROCEDURE: *Judgments and orders – Ex parte stay order – Discharge of – Damages – Whether payable – Whether undertaking as to damages ought to be given by applicant of interim relief – Whether aggrieved party entitled to claim for damages*

The respondent/second respondent ('the developer'), the registered proprietor of 71 pieces of land located at Bukit Gasing, applied to the first respondent ('Datuk Bandar') for planning permission to develop these lands. The applicants/appellants ('the residents'), being owners of the neighbouring properties close to or adjoining to the proposed development, opposed the development purportedly on the basis of, amongst others, the unsuitability of the lands for development. The residents then wrote letters demanding the Datuk Bandar to afford them a formal objections hearing before granting the developer a development order. In response to the letters, the Datuk Bandar informed the residents that a formal objections hearing would not be held as it would contravene existing laws. The residents deemed the Datuk Bandar's letter as a 'decision' that enabled them to commence a judicial review application. A first judicial review application was filed against the Datuk Bandar to quash the purported decision ('the first judicial review application'). The residents applied for and obtained an *ex parte* leave. At this stage, the developer was not made a party to the first judicial review application and had been granted a development order, the hoarding permit and the earthworks approval by the Datuk Bandar. The developer had commenced works on the development. The residents, in respect of the first judicial review application, applied and obtained the *ex parte* stay order. The developer then applied for and obtained an order for joinder as the second respondent to the first judicial review application. Thereafter, the developer

filed a summons under O. 32 r. 6 of the Rules of the High Court 1980 ('RHC') to discharge the *ex parte* stay order ('encl. 26'). The residents filed another judicial review application ('the second judicial review application') for an order of *certiorari* to quash the development order, the hoarding permit and the earthworks approval. The substantive hearing of the first and second judicial review applications were then heard before Aziah Ali J who dismissed the said applications with costs and discharged the *ex parte* stay order. Thus, upon the direction of Aziah Ali J, the outstanding issues in respect of certain prayers to the summons (encl. 26) were set for hearing. *Via* encl. 26, the developers applied for, among others, an inquiry into damages suffered by the developers by reason of the *ex parte* interim order for stay of proceedings ('*ex parte* stay order') which was continued until it was discharged. The High Court Judge allowed the developer's application. Hence, the residents appealed. The two main issues that arose were (i) whether the *ex parte* stay order was in effect an injunction; and (ii) whether damages were payable even though the applicants had refused to give any undertaking to pay damages.

Held (dismissing appeal)
Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:

(1) The *ex parte* stay order was in effect and substance, an injunction. The effect of a stay was suspensory in nature and it has the effect of suspending a proceeding until the stay was discharged pending the disposal or the hearing of some other substantive proceeding. It is directed at the decision-maker, a court or a tribunal. Meanwhile, an injunction in effect is directed at a party to a proceeding and is intended to restrain the performance of an act or conduct by the other party to a proceeding. On an analysis and true construction of the *ex parte* stay order, it could not have been applicable to the Datuk Bandar nor could it be directed to suspending the operation of the Datuk Bandar's decision for which the *ex parte* leave was granted. The *ex parte* stay order was clearly directed at stopping development works that were to be undertaken by the developer. The court must look at the substance rather than to the form and the *ex parte* stay order was in effect and in substance an injunction as it was intended to restrain the developer from proceeding with any development works on the said lands. (paras 28, 29, 31 & 32)

(2) The law, although permitting interim relief to be applied *ex parte*, is silent as to whether an undertaking to damages ought to be provided in the usual course in applying for an interim relief. But, in view of the nature of an *ex parte* relief and the possibility of damage being caused to the other party, in this case being the developer, an undertaking as to

damages ought to be given by the applicant of the interim relief. In the absence of such an undertaking, notwithstanding the objection to give any, would not disentitle the aggrieved party to claim for damages. The court retained the power and the discretion to order damages to be assessed by the party affected by the order for interim relief. Thus, the damages, subject to the assessment, were still payable to the developer. (paras 35-37)

***Bahasa Malaysia** Headnotes*

Responden/responden kedua ('pemaju'), pemilik berdaftar 71 bidang tanah yang terletak di Bukit Gasing, memohon kepada responden pertama ('Datuk Bandar') untuk kebenaran perancangan bagi membangunkan tanah-tanah ini. Pemohon-pemohon/perayu-perayu ('residen-residen'), sebagai pemilik hartanah-hartanah yang berdekatan dengan kawasan itu atau bersebelahan dengan kawasan cadangan pembangunan itu, membantah pembangunan tersebut atas dasar, antara lain, ketidaksesuaian tanah-tanah itu dibangunkan. Residen-residen kemudiannya menulis beberapa surat memohon Datuk Bandar memberikan mereka perbicaraan bantahan rasmi sebelum membenarkan pemaju perintah pembangunan. Sebagai balasan kepada surat-surat tersebut, Datuk Bandar memaklumkan residen-residen bahawa satu perbicaraan bantahan rasmi tidak akan dilaksanakan kerana akan melanggari undang-undang sedia ada. Residen-residen menganggap surat Datuk Bandar sebagai satu 'keputusan' yang membolehkan mereka memulakan permohonan semakan kehakiman. Satu permohonan pertama semakan kehakiman difailkan terhadap Datuk Bandar bagi membatalkan keputusan itu ('permohonan semakan kehakiman pertama'). Residen-residen memohon dan memperoleh kebenaran *ex parte*. Pada peringkat ini, pemaju tidak dijadikan pihak kepada permohonan semakan kehakiman dan telah diberikan perintah pembangunan, permit papan dendeng dan kelulusan kerja tanah oleh Datuk Bandar. Pemaju telah memulakan kerja-kerja pembinaan. Residen-residen, berkenaan permohonan semakan kehakiman pertama, memohon dan memperoleh perintah penangguhan *ex parte*. Pemaju kemudiannya memohon dan memperoleh perintah pencantuman sebagai responden kedua kepada permohonan semakan kehakiman pertama. Kemudiannya, pemaju memfailkan saman bawah A. 32 k. 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk menolak perintah penangguhan *ex parte* (lampiran 26). Residen-residen memfailkan lagi satu permohonan semakan kehakiman ('permohonan semakan kehakiman kedua') untuk perintah *certiorari* bagi membatalkan perintah pembangunan, permit papan dendeng dan kelulusan kerja-kerja tanah. Perbicaraan substantif permohohan semakan pertama dan kedua telah didengar di hadapan Aziah Ali H yang menolak permohonan-permohonan tersebut dengan kos dan menolak perintah penangguhan *ex parte*. Dengan itu, atas arahan Aziah Ali H, isu-isu yang belum diselesaikan berkenaan beberapa tuntutan saman (lampiran 26) ditetapkan untuk perbicaraan. Melalui lampiran 26, pemaju memohon, antara lain, inkuiri ganti rugi bagi kerugian yang dialami pemaju akibat

perintah interim penangguhan prosiding *ex parte* ('perintah penangguhan *ex parte*') yang berlanjutan sehingga ia ditolak. Hakim Mahkamah Tinggi telah membenarkan permohonan pemaju. Oleh itu, residen-residen merayu. Dua isu utama yang timbul adalah (i) sama ada perintah penangguhan *ex parte* adalah satu injunksi; dan (ii) sama ada ganti rugi perlu dibayar walaupun pemohon-pemohon enggan memberikan apa apa aku janji membayar ganti rugi.

Diputuskan (menolak rayuan)
Oleh Umi Kalthum Abdul Majid HMR menyampaikan penghakiman mahkamah:

(1) Perintah penangguhan *ex parte* adalah, secara kesan dan inti patinya, satu injunksi. Kesan penangguhan bersifat suspensori dan mempunyai kesan penggantungan prosiding sehingga penangguhan dilepaskan sementara menunggu pelupusan atau perbicaraan prosiding substantif yang lain. Ia diarahkan terhadap pembuat keputusan, mahkamah atau tribunal. Sementara itu, injunksi secara efek diarahkan terhadap pihak kepada prosiding dan bertujuan untuk menghalang pelaksanaan tindakan oleh pihak yang lain dalam prosiding. Berdasarkan analisis dan pembentukan sebenar perintah penangguhan *ex parte*, ia tidak terpakai kepada Datuk Bandar dan tidak boleh diarahkan terhadap menggantungkan operasi keputusan Datuk Bandar yang mana kebenaran *ex parte* diberikan. Perintah penangguhan *ex parte* dengan jelasnya diarahkan terhadap memberhentikan kerja-kerja pembangunan yang diambil oleh pemaju. Mahkamah harus melihat pada kesan dan inti pati sesuatu injunksi kerana bertujuan untuk melarang pemaju daripada meneruskan dengan apa-apa kerja pembangunan atas tanah-tanah tersebut.

(2) Undang-undang, walaupun membenarkan relif interim diguna pakai secara *ex parte*, tidak menyatakan sama ada satu aku janji ganti rugi harus diberikan dalam kursus biasa memohon relif interim. Tetapi, memandangkan sifat relif *ex parte* dan kemungkinan kerugian dilakukan terhadap pihak yang lain, dalam kes ini pemaju, aku janji berkenaan ganti rugi harus diberikan oleh pemohon relif interim. Dalam ketiadaan aku janji sebegitu, meskipun bantahan untuk memberikannya, tidak bermaksud pihak terkilan tidak boleh menuntut ganti rugi. Mahkamah mengekalkan kuasa dan budi bicara untuk memerintahkan ganti rugi ditaksirkan oleh pihak yang terjejas melalui perintah relif interim. Oleh itu, ganti rugi, tertakluk pada taksiran, harus dibayar kepada pemaju.

Case(s) referred to:
Eveready Manufacturing (Pte) Ltd v. Explast Industries Sdn Bhd [1998] 5 CLJ 212 HC ***(refd)***
Puah Bee Hong @ Bee Hong (F) & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Robert Teo Keng Tuan, Intervener) & Another Case [1994] 2 CLJ 705 SC ***(refd)***

Pui Chiau Tien v. Foi Chaw Leong & Anor [2004] 5 CLJ 145 HC ***(refd)***
Regina v. Inspectorate of Pollution & Anor, Ex Parte Greenpeace Ltd [1994] 1 WLR 570 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 6

For the appellants - Malik Imtiaz Sarwar, Balbir Singh, Pavendeep Singh & Ho How Keong; M/s Najiana Wan Balbir
For the respondent - Joslyne Delano Gooting, RR Sethu & Lum May Lan; M/s L Lum & Co
Watching brief - Jason Gopal; M/s M L Lum & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: R1-25-38 Year 2008 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Umi Kalthum Abdul Majid JCA:

Introduction

[1] This was an appeal by the appellants/applicants against the decision of the learned High Court Judge in allowing the respondent's/second respondent's application under O. 32 r. 6 of the Rules of the High Court 1980 (RHC) in encl. 26 in respect of prayers (b) to (e).

[2] Enclosure 26 was an application by the respondent/second respondent to, among others, hold an inquiry into damages suffered by the respondent/second respondent by reason of the *ex parte* interim order for stay of proceedings dated 2 April 2008 (*ex parte* stay order) which was continued until it was discharged by the learned High Court Judge Justice Aziah Ali (as she then was) on 6 September 2010.

[3] For ease of reference, the parties will be referred to as follows:

(a) the applicants/appellants as "the residents";

(b) the respondent/second respondent as "the developer"; and

(c) the first respondent in the first judicial review application as "the Datuk Bandar".

Background Facts

[4] The developer is the registered proprietor of 71 pieces of land located at Bukit Gasing. The developer, with the intention to develop these lands, had applied to the Datuk Bandar for planning permission.

[5] The residents, being the owners of the neighbouring properties close to or adjoining to the proposed development opposed the development purportedly on the basis of, amongst others, the unsuitability of the lands for development.

[6] The residents then individually wrote identical letters all dated 31 May 2007 to 2 June 2007 demanding the Datuk Bandar to afford them a formal objections hearing before granting the developer a development order.

[7] In response to the letters, the Datuk Bandar, *vide* letter dated 31 December 2007 to the residents, informed them that a formal objections hearing would not be held as it would contravene existing laws. The residents deemed the Datuk Bandar's letter dated 31 December 2007 as a 'decision' that enabled them to commence a judicial review application.

[8] A first judicial review application was filed on 11 February 2008 against the Datuk Bandar to quash the purported decision contained in the letter dated 31 December 2007 (the first judicial review application). The residents applied for and obtained an *ex parte* leave on 17 March 2008. The hearing of the substantive application of the first judicial review application was scheduled on 23 April 2008.

[9] It is essential to note that at this stage, the developer was not made a party to the first judicial review application. The developer, on the other hand, had been granted a development order dated 2 October 2007 (development order), the hoarding permit dated 16 November 2007 (hoarding permit) and the earthworks approval dated 31 March 2008 (earthworks approval) by the Datuk Bandar. The developer had commenced works on the development by erecting the perimeter fencing and hoarding to the subject lands.

[10] The residents, in respect of the first judicial review application, applied and obtained the *ex parte* stay order (the subject matter of this appeal) on 2 April 2008. An excerpt of the order is reproduced as follows:

> ADALAH DIPERINTAHKAN bahawa satu Perintah Interim untuk menggantung semua tindakan selanjutnya kononnya berdasarkan dua (2) kelulusan (approvals) yang bertarikh 2 Oktober 2007 (ref no. (185) dlm. DBKL.JPRB.5114/77PT.1) dan 16 November 2007 (ref no. BGN BS S1 2007 SEM 6) sehingga pendengaran penuh permohonan *inter partes* yang telah ditetapkan pada 23 April 2008 dalam prayer 2 dan 3 di Kandungan 1 didengari oleh Mahkamah ini DAN AKHIRNYA DIPERINTAHKAN bahawa kos permohonan ini adalah kos dalam kausa.

[11] The developer then applied for and obtained an order on 11 April 2008 for joinder as the second respondent to the first judicial review application. Thereafter, the developer filed the summons dated 15 April 2008 under O. 32 r. 6 of the RHC (application to discharge the *ex parte* stay order) (encl. 26).

[12] The High Court proceeded to hear the first judicial review application on 25 April 2008 but in respect of the residents' application to extend the *ex parte* stay order. The proceeding, however, was commenced but not completed. The residents had contended that they only became aware of the existence of the development order, the hoarding permit and the earthworks approval on 16 April 2008 through the developer's affidavit affirmed by Tan Yit Chong on 15 April 2008. (encl. 29).

[13] Realising that the *ex parte* order for leave was sought and obtained on the basis of the first judicial review application statement (review statement) dated 11 February 2008 (encl. 2) in respect of a specific challenge to the Datuk Bandar's letter dated 31 December 2007, the residents then filed an application to amend the review statement (amendment application) to enable the residents to apply for *certiorari* to quash the development order, the hoarding permit and the earthworks approval.

[14] The residents, without proceeding with the hearing of the amendment application or with the continued hearing to extend the *ex parte* stay order, filed another judicial review application (second judicial review application).

[15] The second judicial review application was essentially filed for an order of *certiorari* to quash the development order, the hoarding permit and the earthworks approval.

[16] The leave application for the second judicial review application was heard before Justice Lau Bee Lan without disposing of the pending amendment application and the substantive hearing of the first judicial review application.

[17] The leave to apply for the second judicial review was granted by Justice Lau Bee Lan on 24 April 2009. The decision was then affirmed by the Court of Appeal and the leave to appeal to the Federal Court against the granting of the leave was dismissed.

[18] The substantive hearing of the first and second judicial review applications were then heard before Justice Aziah Ali on 6 September 2010 who dismissed the first and the second judicial review applications with costs, discharged the *ex parte* stay order and directed that the issue of whether the residents be ordered to pay damages be dealt with after the disposal of the residents' appeal against the High Court Judge's decision.

[19] The residents then filed an appeal against Justice Aziah Ali's decision against the dismissal of the first and second judicial review applications and the appeals were dismissed by the Court of Appeal on 6 March 2012 and the leave to appeal to the Federal Court was dismissed on 2 October 2012.

[20] Thus, upon the direction of Justice Aziah Ali after she delivered the High Court decision, the outstanding issues in respect of prayers (b), (c), (d) and (e) to the summons dated 15 April 2008 (encl. 26) being the subject

matter of this appeal were set for hearing. Enclosure 26 prayer (b) prayed for an enquiry to be held into damages suffered by the developer by reason of the said *ex parte* stay order.

[21] Enclosure 26 was heard before Justice Zaleha Yusof (the learned High Court Judge) (as she then was) and prayers (b) to (e) of the same were allowed.

At The High Court

[22] The residents, in opposing the developer's encl. 26, contended that the developer was estopped from seeking the court to hear this application as the merits of the second judicial review application had been decided up to the Federal Court; there was delay on the developer's part in filing encl. 26. In addition to that, the residents also argued that the issues brought up in encl. 26 were never before the High Court Judge in the previous judicial review applications, and were never before the Court of Appeal and the Federal Court and thus, the developer must be estopped from raising it now.

[23] The residents further contended that the *ex parte* stay order was not an injunction order and the developer was not entitled to seek any damages arising out of that order.

[24] The learned High Court Judge, in allowing the developer's application, observed as follows:

(a) between the period of 23 April 2008 (the hearing date of the first judicial review application) until 6 September 2010 (the date of the decision of the two judicial review applications), the *ex parte* stay order was continued by consent of the parties with an express reservation of the rights of the developer;

(b) Justice Aziah Ali, in delivering her judgment, had ordered the discharge of the *ex parte* stay order and reserved the issue of the consequential orders prayed for in encl. 26 application to be dealt with after the appeals by the residents had been exhausted. Therefore, the developer was not estopped from asking the court to hear encl. 26;

(c) the developer was never a party to the first judicial review application until after the *ex parte* stay order was applied and granted by the court;

(d) the subject matter of the *ex parte* stay order was in respect of the development works that were to be undertaken by the developer and thus the learned High Court Judge was of the view that there was nothing for the Datuk Bandar to do or refrain from doing under the first judicial review application which was capable of a stay;

(e) the learned High Court Judge also observed that the granting of an *ex parte* order that may adversely affect the rights of either the third party or other parties to the proceedings are not unusual in law and thus there is a practice for such an undertaking as to damages to be given by the applicant for interim relief and the absence of such undertaking does not make the order irregular or liable to be set aside (the cases of *Pui Chiau Tien v. Foi Chaw Leong & Anor* [2004] 5 CLJ 145 and *Eveready Manufacturing (Pte) Ltd v. Explast Industries Sdn Bhd* [1998] 5 CLJ 212 were referred to by the learned judge for this proposition); and

(f) the learned High Court Judge further decided that the court retained the power and the discretion to order damages to be assessed by the party affected by the order for interim relief.

The Appeal

[25] The appeal before us now concerned two main issues and they are as follows:

(a) whether the *ex parte* stay order was in effect an injunction?

(b) whether damages are payable even though the appellants had refused to give any undertaking to pay damages?

Whether The Ex Parte Stay Order Was In Effect An Injunction

[26] The residents' main contention in relation to the first issue was that the first judicial review application was premised on the reason that the residents had not been allowed to state their objections before the Datuk Bandar made his decision to approve the two development orders. It was on this aspect that the *ex parte* stay order was granted against the Datuk Bandar and for all intents and purposes, it was intended to suspend the decision of the Datuk Bandar pending the outcome of the first judicial review application and it could not be construed as an injunction.

[27] The residents also argued that the relief of a stay of proceedings was a distinct and separate remedy from that of the injunctive relief. The *ex parte* stay order was granted without any undertaking as to damages and further, it was obtained against the first respondent, that is, the Datuk Bandar, not the developer.

[28] We were of the view that the *ex parte* stay order was in effect and substance, an injunction. It is essential to note that the effect of a stay is suspensory in nature and it has the effect of suspending a proceeding until the stay is discharged pending the disposal or the hearing of some other substantive proceeding. It is directed at the decision-maker, a court or a tribunal. Meanwhile, an injunction in effect is directed at a party to a proceeding and is intended to restrain the performance of an act or conduct by the other party to a proceeding. The Supreme Court in *Puah Bee Hong @*

Bee Hong (F) & Anor. v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Robert Teo Keng Tuan, Intervener) & Another Case [1994] 2 CLJ 705; [1994] 2 MLJ 601, per Peh Swee Chin SCJ (delivering the judgment of the court) (as he then was), held, at p. 712 (CLJ); p. 609 (MLJ) as follows:

> Again an order for staying proceedings or for staying the execution of an order of a lower court or an inferior tribunal (*viz* one of those public authorities or bodies exercising judicial or *quasi*-judicial functions or otherwise deemed to be acting judicially and amenable to the High Court's supervision either by way of appeal or judicial review), is not an injunction, not only in name, but also for some distinctive dissimilarities which are well indicated in a passage from *Nelson's Law of Injunctions* (3rd Ed) as follows:
>
> > An order of stay in an execution matter is in the nature of a prohibitory order and is addressed to the court that is carrying out execution. It is not of the same nature as an order allowing an appeal and quashing executions proceedings. That kind of order takes effect immediately it is passed, for such an order takes away the very jurisdiction of the court executing the decree as there is nothing left to execute thereafter. But a mere order of stay of execution does not take away the jurisdiction of the court. All that it does is to prohibit the court from proceeding with the execution further, and the court unless it knows of the order cannot be expected to carry it out. Therefore, till the order comes to the knowledge of the court its jurisdiction to carry on execution is not affected by a stay order which must in the very nature of things be treated to be prohibitory order directing the executing court which continues to have jurisdiction to stay its hand till further orders. It is clear that as soon as a stay order is withdrawn, the executing court is entitled to carry on execution and there is no question of fresh conferment of jurisdiction by the fact that the stay order has been withdrawn. The jurisdiction of the court is there all along ... **In effect, therefore, a stay order is more or less in the same position as an order of injunction with one difference. An order of injunction is generally issued to a party and it is forbidden from doing certain acts**. It is well settled that in such a case the party must have knowledge of the injunction order before it could be penalised for disobeying it. Further it is equally well settled that the injunction order not being addressed to the court, if the court proceeds in contravention of the injunction order, the proceedings are not a nullity. In the case of a stay order, as it is addressed to the court, and prohibits it from proceeding further, as soon as the court has knowledge of the order it is bound to obey it and if it does not, it acts illegally, and all proceedings taken after the knowledge of the order would be a nullity. That is the only difference between an order of injunction to a party and an order of stay to a court.
>
> (emphasis added)

[29] On analysis and true construction of the *ex parte* stay order, we found that it could not have been applicable to the Datuk Bandar nor could it be directed to suspending the operation of the Datuk Bandar's decision dated 31 December 2007 for which the *ex parte* leave was granted on 17 March 2008. The *ex parte* stay order was clearly directed at stopping development works that were to be undertaken by the developer.

[30] We observed from the outset that the residents' intention had always been to prevent and/or restrain the developer from carrying out its development works on the lands in furtherance of the development order and the hoarding permit that had been issued earlier by the Datuk Bandar.

[31] We agreed with the learned High Court Judge when she referred to the Court of Appeal of England's case of *Regina v. Inspectorate of Pollution & Anor, Ex Parte Greenpeace Ltd* [1994] 1 WLR 570 for the proposition that the court, in considering whether to grant the stay, should look to the substance rather than the form of the application and apply the same principles as would have been applicable if the application had been for an interlocutory injunction. Glidewell LJ, at p. 573 and Scott LJ, at p. 576, stated as follows:

Per Glidewell LJ:

> That then, however, raised for the judge this difficult question, on which, so far as I know, there is no authority: where it is sought to stay a decision of a government department, and the effect of granting the stay will be to affect detrimentally the operations of a third party who are not parties to the proceedings, what is the proper approach for the court, from which the stay is sought, to adopt?
>
> If the third parties are made third parties to the proceedings, as they could be, and if an interlocutory injunction was sought against them, then the answer to the question would be clear: the court would then apply the normal principles it applies when an interlocutory injunction is sought, those laid down in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396.
>
> In this case that did not happen because B.N.F.L. were not made parties and no interlocutory injunction has been sought against them. It is quite clear, in my view, that Brooke J. treated this application for a stay, in a sense, as if it were an application for an interlocutory injunction against B.N.F.L., and he applied the principles he would have applied had he been considering such an application. In my judgment, he was entirely right to do so. *If a third party would be affected by a decision on an application for a stay but is not made a party to the proceedings as a respondent to an application for an injunction, then, in my view, nevertheless, the same principles should be followed.*

Per Scott LJ:

> In my opinion, if the real purpose of interlocutory relief in a judicial review case is to prevent executive action by a third party being carried our pursuant to the decision under attack, the more suitable procedure would

A be to have the third party in question joined and then to seek an interlocutory injunction against that party rather than to seek a stay of the decision. If, however, the purpose is pursued as it has been in the present case by an application for a stay of the decision rather than by an application for an interlocutory injunction against the third party, the courts should, in my opinion, look to the substance rather than to the
B form, and apply the same principles to the application as would have been applicable had the application been for an interlocutory injunction.

(emphasis added)

[32] Thus, it is clear from the above authorities that this court must look
C at the substance rather than to the form and the *ex parte* stay order was in effect and in substance an injunction as it was intended to restrain the developer from proceeding with any development works on the said lands.

Whether Damages Are Payable Even Though The Residents/Appellants Had Refused To Give Any Undertaking To Pay Damages

D **[33]** The residents had been adamant with their contention that they had at all times expressly refused to give any undertaking to pay damages when the developer's counsel had requested for a cross-undertaking as it was the residents' contention all along that this was a stay order pending a judicial review.

E **[34]** The residents contended that no undertaking as to damages can be implied or imposed on them as the residents had expressly objected to giving such undertaking. The residents further contended that the developer was estopped from seeking any damages now as the respondent ought to have encl. 26 heard immediately upon the refusal of the residents to give an
F undertaking.

[35] With respect, we found the residents' arguments to be misconceived. The law, although permitting interim relief to be applied *ex parte*, is silent as to whether an undertaking to damages ought to be provided in the usual
G course in applying for an interim relief. But, in view of the nature of an *ex parte* relief and the possibility of damage being caused to the other party, in this case being the developer, an undertaking as to damages ought to be given by the applicant of the interim relief. We were of the view that in the absence of such an undertaking, notwithstanding the objection to give any, would not disentitle the aggrieved party to claim for damages.

H **[36]** We also agreed with the learned High Court Judge that in the absence of an undertaking, the court retained the power and the discretion to order damages to be assessed by the party affected by the order for interim relief.

I

[37] Thus, despite the objections of the learned counsel for the residents, the damages, subject to the assessment, are still payable to the developer.

Conclusion

[38] Based on the aforesaid reasons, we found no merit in this appeal and we unanimously dismissed the appeal with costs of RM7,000 and ordered the deposit to account of costs.